

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

ROBERT L. PERALEZ,

Appellant,

v.

Case No. 11-SUS-04-0117

BOWLING GREEN STATE UNIVERSITY,

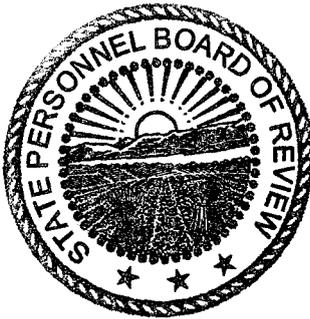
Appellee

ORDER

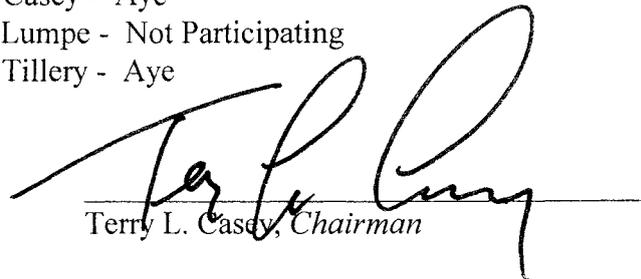
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant order of suspension for five (5) days issued to Appellant, effective April 25, 2011 through April 29, 2011, from the position of Security Officer 2 is **AFFIRMED**, and the Appellant's appeal is **DENIED**.



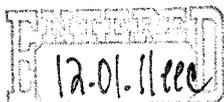
Casey - Aye
Lumpe - Not Participating
Tillery - Aye


Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, December 01, 2011.




Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Robert L. Peralez,

Case No. 11-SUS-04-0117

Appellant

v.

September 26, 2011

Bowling Green State University,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On April 15, 2011, the Bowling Green State University (hereinafter BGSU) served an Order of Suspension, in accordance with Ohio Revised Code Section 124.34, upon the Appellant, Robert L. Peralez, a Security Officer 2. The order alleged the following:

This will notify you that you are suspended from your position of Security Officer 2 effective April 25 through April 29, 2011.

The reason for this action is that you have been guilty of specifically: 124.34 (A) neglect of duty – leaving the premises during work time without supervisor approval.

Thereafter, on April 20, 2011, the Appellant filed a timely appeal from this order and the record hearing in this case was held on September 16, 2011. Present at the record hearing was the Appellant, Robert L. Peralez, who appeared *pro se*, and the Appellee, the Bowling Green State University was present through its designee, Ms. Marsha Serio, the Manager of Employment and Employee Relations, and was represented by Mr. Robert Fekete, an Assistant Attorney General.

This hearing was conducted by the State Personnel Board of Review in accordance with O.R.C. section 124.34, which specifically provides that an employee may file an appeal of any order filed under O.R.C. section 124.34, within ten (10) days after having received the order with the State Personnel Board of

Review. The parties agreed and stipulated to the jurisdiction of this Board, as well as the to the timely filing of the appeal

STATEMENT OF THE CASE

The Appellee called as its first witness the Appellant, Robert L. Peralez, as if on cross-examination. When questioned, the witness testified that he has worked at the Bowling Green State University as a Security Officer 2 for the last 19 years, while being employed for total of 23 years at BGSU. The witness then identified Appellee's Exhibit 1 as a job description of his Security Officer 2's position which he signed off on and attested to its accuracy. Further, the witness identified Appellee's Exhibit 2 as a current table of organization of the Parking and Shuttle Services Division within BGSU, noting that Mr. Bob Mason is his supervisor who was held that position for the last 10 years, and that Mr. Aaron Kane is Mr. Mason's supervisor, a position he's held for little over the last year.

Next, when questioned, the witness attested that he is aware that BGSU has a classified employee handbook, and that within this handbook it has a policy about being off premises without supervisory permission. Further, the witness testified that he is also aware one can face possible discipline for being off premises without supervisory permission, if this happens. The witness then identified Appellee's Exhibit 8 as BGSU's disciplinary guideline chart, a part of the classified employee handbook and noted there is under the minor offenses a charge for leaving premises during scheduled work time without supervisory permission.

The witness identified Appellee's Exhibit 3 as a notice of pre-disciplinary action which he received on or about March 23, 2011, regarding the charge of leaving work premises during scheduled work time without supervisory permission on March 21, 2011. The witness also identified Appellee's Exhibit 4 as a report from the disciplinary panel which he received on or about April 14, 2011, for leaving the work premises without properly notifying his supervisor, wherein the panel recommended that he receive a one-day suspension without pay for his willful failure to follow the work rules which he acknowledged he was aware of. Further, the witness identified Appellee's Exhibit 6 as a memorandum dated April 15, 2011, from Ms. Rebecca Ferguson, the Chief Human Resources Officer, the appointing authority in this case, wherein it was noted that she respectfully disagreed with the panel's recommendation of a one-day suspension, considering that Mr. Peralez has had four (4) previous written warnings and a three-day suspension for failing to

follow work rules and for conduct unbecoming of a BGSU employee, and that progressive disciplinary principles dictated a more severe penalty should be applied. Thus, Ms. Ferguson recommended that Mr. Peralez should be suspended for five unpaid days. The witness identified Appellee's Exhibit 7, as the instant order suspension issued to the Appellant on about April 15, 2001 that was for neglect duty for leaving the premises during work time without supervisor approval. When questioned, the witness testified that he is aware that he can call his supervisor or the dispatcher 's office when he goes out for lunch, a "code 23", noting that he is unavailable for service.

The next line of questioning then centered on the events that took place on March 21, 2011. When questioned, the Appellant testified that he went to the Hunan buffet, which was off-campus, albeit only across the street, and spent approximately only five (5) minutes there while picking up his lunch on the afternoon question. The witness explained that he was available for service, as his radio was on, and that he only just went there to pick up his lunch. Further, when questioned, the Appellant testified that the next day when talking to Mr. Mason, his supervisor, explained that he told him that he did go off-campus to retrieve his lunch and agreed that he did not notify either Mr. Mason or the dispatcher. Furthermore, when questioned, the witness attested that he had received prior discipline in the form of verbal and written warnings for exactly the same things in the past.

The witness then identified Appellee's exhibits 10, 11, 12, 13 and 14 as four (4) previous written warnings for leaving work premises during scheduled work time without supervisory permission and a three day suspension for conduct unbecoming of a University employee.

Appellee's next witness to testify was Mr. Robert Mason who has been employed at BGSU as a Field Staff Supervisor for the last 12 years, and is the direct supervisor of the Appellant herein. When questioned, the witness testified that he supervises three (3) full-time staff and nine (9) part-time staff, including the Appellant as a Security Officer 2. The witness then identified Appellee's Exhibit 1 as a job description of a Security Officer 2 position, the position held by the Appellant. Further, when questioned, the witness testified that whenever one goes to lunch they are required to either call the dispatcher's office and or him so he can note this in the radio log to know when that individual is unavailable for service.

The witness then recalled the incident which occurred on March 21, 2011, surrounding Mr. Peralez. The witness explained that on that day in question he was sick and not at work, but that Mr. Aaron Kane, his supervisor had texted him stating that Mr. Peralez was not on campus grounds. Further, the witness noted that Mr. Kane was not aware at that time of the previous verbal and written warnings and suspension that had been issued against Mr. Peralez. The witness explained that when he came to work the next day he had a conversation with Mr. Kane and they both contacted the Human Resources Office. Shortly thereafter, the witness explained that they then sat down with Mr. Peralez to inquire about his side of the story. Furthermore, the witness testified that Mr. Peralez had stated that he was off campus grounds at the beginning of his lunch time getting food at the Hunan buffet, a restaurant just adjacent and/or across the street from the campus.

Moreover, when questioned, the witness explained that he has had others under his supervision that had left the premises without his permission, in addition to Mr. Peralez. Mr. Mason testified that he had one part-time officer that left the grounds without his permission and that he was issued a verbal warning as this was his first time, as well as a student employee had done the same thing for the first time and that he received a verbal warning, as well.

With respect to Mr. Peralez's previous discipline the witness explained that he had been issued two (2) verbal warnings and four (4) written warnings for leaving the premises during work time without supervisor approval, and a three-day suspension for conduct unbecoming of a University employee.

On cross-examination, the witness identified Appellee's Exhibit 8 and noted under the offense of leaving premises during scheduled work time without supervisor permission does require the individual who does leave the premises to notify either the dispatcher's office or him when they leave campus, even if it is to pick up something such something such as lunch across the street. However, the witness did agree that one who takes a lunch break is not technically at work. The witness then identified and read into the record part of Appellee's Exhibit 4, page 2, of the panel's recommendation which stated in pertinent part:

Proactive steps also need to be taken to stop the behavior throughout the department. Waiting for an infraction to be reported is not the best approach when the problem is widespread. This method runs the risk of appearing to single out an individual, which

is not the intent of the department. Monitoring all employees' activities for a time may be needed to stress the point in changing behavior. A more consistent approach enforcing a work rules across departments is encouraged. It is felt that a culture has been allowed to emerge in which laissez-faire attitude toward the personal use of state vehicles has been widely tolerated and led to perceived abuse.

Appellee's last witness to testify was Ms. Marsha Serio, the Manager of Employment and Employee Relations, a position she has held at BGSU since January 2002. When questioned, the witness explained that as part of her duties she handles most all of the disciplinary hearings, and that she acts as the hearing officer in most these cases, as well. Further, when questioned, the witness testified that she is familiar with Mr. Robert Peralez as she has handled and/or processed a couple of his disciplinary matters that were before her.

With respect to Mr. Peralez's current disciplinary action, the witness explained that Mr. Kane had contacted her and inquired as to what they should do, as it was learned that Mr. Peralez had been off-campus without supervisory authority during his work hours. The witness recalled that during the pre-disciplinary hearing, as she was in attendance thereof, Mr. Peralez agreed that he had been off-campus without supervisory authority and that he had not contacted the dispatcher's office or notified his supervisor of the same.

The witness then identified Appellee's Exhibit 4, as the report of the disciplinary panel's recommendation wherein it was noted that they came to the conclusion that Mr. Peralez should receive a one day suspension. However, the witness testified that Ms. Ferguson, her immediate supervisor, as per part of the classified staff handbook (see Appellee's Exhibit 9, page 59) has the ability to modify a panel's recommendation and/or decision, if she so desires. The witness then identified Appellee's Exhibit 5 as a letter from Ms. Rebecca Ferguson, the Chief Human Resources Officer dated April 15, 2011, a letter which she helped draft for Ms. Ferguson, which went to the disciplinary panel of Mr. Peralez, which notified them that she was modifying their decision and that Mr. Peralez was going to serve a five (5) days suspension without pay. The witness explained that Ms. Ferguson considered that Mr. Peralez had had four (4) previous written warnings for leaving the premises during scheduled work time without supervisor approval and a

three-day suspension for conduct unbecoming of a University employee, and that Ms. Ferguson believed that progressive disciplinary principles dictated that a more severe penalty should be applied in this case since Mr. Peralez either cannot or will not follow reasonable guidelines for his job performance.

On cross-examination, the witness explained that lunch is considered by Human Resources to be non-paying ranging from 30 min. to one hour in length. Again, this witness was asked to then read into the record the first paragraph of the second page of Appellee's Exhibit 4, wherein it is noted of the inconsistencies of applying discipline as was found by the disciplinary panel.

On redirect examination, the witness testified that if the employee is found off-campus without his or her supervisor's authority during work hours and or approval it can lead to discipline.

The Appellant, Robert Peralez, began his case-in-chief by calling himself to the witness stand. The witness testified as to the harshness of his punishment as well as to his belief that he was being singled out and/or being discriminated against and that double standards were being applied to him, as opposed to others.

FINDINGS OF FACT

1. The jurisdiction of this Board to conduct this hearing was established by O.R.C. § 124.34.
2. Mr. Peralez has served BGSU as a Security Officer 2 for the last nineteen (19) years.
3. The Appellant, Robert Peralez, as a Security Officer 2, was suspended from his position with BGSU for violating the O.R.C. § 124.34 for neglect of duty for leaving the premises during work time without supervisor approval.
4. On April 15, 2011, BGSU hand delivered Mr. Peralez an O.R.C. § 124.34 Order of Suspension which suspended Mr. Peralez from his position effective April 25, 2011 through April 29, 2011.
5. The Appellee stipulated to the fact that Appellant's appeal was timely filed.

6. The Appellant, Mr. Peralez, since August 2006 has had four (4) written warnings for leaving the premises during work time without supervisor approval and one (1) three day suspension for conduct unbecoming of a University employee prior to the issuance of the instant disciplinary action.
7. The Appellee did prove by a preponderance of the evidence that Mr. Love received his procedural due process through a pre-disciplinary hearing.
8. The Appellee, by a preponderance of the evidence, established that standards of conduct existed for and were known by Mr. Peralez, regarding leaving the premises during work time without supervisor approval. The testimony and documentary evidence presented at the record hearing established by a preponderance of the evidence that the Appellant:
 - a. On March 21, 2011, Mr. Peralez went off campus to get lunch at the Hunan buffet during work time without his supervisor's approval;
 - b. On March 21, 2011, Mr. Peralez did not call the dispatcher's office or attempt to call his supervisor Mr. Mason and/or Mr. Kane before leaving the work premises as required;
 - c. Mr. Peralez has received four (4) previously issued written warnings regarding leaving the premises during work time without supervisor approval.
 - d. Mr. Peralez failed to prove by a preponderance of the evidence disparate treatment on behalf of the Appellee.

CONCLUSIONS OF LAW

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, and that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one or more of the enumerated infractions listed in O.R.C. § 124.34 and the disciplinary order.

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by O.R.C. § 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant was notified of and had an opportunity to participate in a pre-disciplinary hearing. The Appellant also had notice of the charges against him and an opportunity to respond to those charges. Accordingly, the undersigned Administrative Law Judge finds that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellee established by a preponderance of the evidence that it had established standards of conduct and that such standards had been communicated to Appellant. According to the O.R.C. § 124.34 Order, Appellant's five (5) day suspension was based upon his neglect of duty.

Neglect of Duty

Appellee proved by a preponderance of the evidence that Mr. Peralez was guilty of neglect of duty. Ohio Revised Code Chapter 124 does not define "neglect of duty." However, Black's Law Dictionary does define "neglect" to mean:

. . . to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in doing or omission of a given act. And it may mean a designed refusal, indifference or unwillingness to perform one's duty. Black's Law Dictionary 1031 (Deluxe 6th Ed. 1990).

For the Appellee to establish that an employee committed neglect of duty, the Appellee must demonstrate that a duty upon the part of the employee existed, the employee knew of that duty, and that knowing of that duty, the employee breached that duty.

As was revealed by the testimony, the Appellee did prove by a preponderance of the evidence that the Appellant was being neglectful in his duties. The documentary and testimonial evidence revealed that the Appellant knew of the established standard of conduct with regards to leaving the premises during work time without supervisor approval, that one cannot do this. The evidence revealed that the Appellant, Mr. Peralez, went off campus to get lunch at the Hunan buffet during work time without his supervisor's approval, did not call the dispatcher's office or attempt to call his supervisor Mr. Mason and/or Mr. Kane before leaving the work premises as required. Further, the evidence revealed that Mr. Peralez had received four (4) previously issued written warnings regarding leaving the premises during work time without supervisor approval before the issuance of the instant discipline.

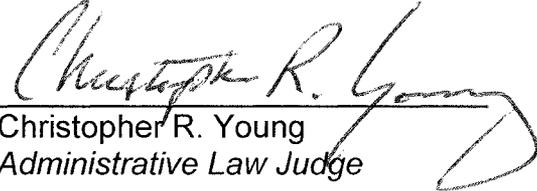
The question remains of whether the discipline imposed should be sustained. The undersigned Administrative Law Judge recommends that the evidence presented at the record hearing, taking the totality of the circumstances into account, is sufficient to support the five (5) day suspension of the Appellant. If this action would have been Mr. Peralez's first brush with violating the instant rule of leaving the premises during work time without supervisor approval the five (5) day suspension would most likely be amended to a lesser degree. However, in this case the evidence revealed that the Appellant, Robert Peralez, from 2006 – 2010, two (2) verbal warnings, along with receiving four (4) written warnings for leaving the premises during work time without supervisor approval and a one (1) three day suspension for conduct unbecoming of a University employee prior to the issuance of the instant discipline. It appears to the undersigned Administrative Law Judge

Robert L. Peralez
Case No. 11-SUS-04-0117
Page 10

that the Appellant was not taking any meaningful steps to comply with his supervisor's directives or better fulfill his duties as a Security Officer 2 as expressed to him by his supervisors. Therefore, the undersigned Administrative Law Judge concurs with the Appellee's decision to suspend the Appellant for five (5) days.

RECOMMENDATION

Therefore, based upon the above analysis, I respectfully **RECOMMEND** that the instant order of suspension for five (5) days issued to Appellant, effective April 25, 2011 through April 29, 2011, from the position of Security Officer 2 be **AFFIRMED**, and the Appellant's appeal be **DENIED**.


Christopher R. Young
Administrative Law Judge

CRY: